Supreme Court, U. S.
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Nos. 80-895 and 80-936

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,

Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,

Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer Inc. have filed Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.* These petitions present the question whether there is an implied private cause of action for damages against commodity brokers for the alleged violation of various provisions of the Commodity Exchange Act, 7 U.S.C. §§1-24, (the "Act") including Section 4b of the Act.

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*The listing, as required by Rule 28.1 of the Rules of the Supreme Court of the United States, of parent and subsidiary corporations and affiliates of Clayton Brokerage Co. of St. Louis, Inc. appears in its Petition for a Writ of Certiorari. For Heinold Commodities, Inc. and Thomson & McKinnon Auchincloss Kohlmeyer, Inc., this listing is attached to their Joint Petition for a Writ of Certiorari.

These petitioners submit this supplemental brief in support of their petitions in order to call the Court's attention to the recent decision of the United States Court of Appeals for the Fifth Circuit in *Rivers* v. *Rosenthal & Company*, No. 79-1313, December 16, 1980. (The opinion in *Rivers* is reprinted in the Joint Appendix to Supplemental Briefs in Support of Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit ("Joint Appendix") filed on behalf of all petitioners in Nos. 80-757, 80-895 and 80-936). This decision holds, contrary to the decisions of the United States Courts of Appeals for the Second Circuit and the Sixth Circuit in *Leist* v. *Simplot*, 2 Comm. Fut. L. Rep. (CCH) ¶21,051 (2d Cir. 1980) and *Curran* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), that no implied private cause of action for damages exists in favor of a customer against his commodity broker for the alleged violation of Section 4b of the Act (7 U.S.C. §6b) and another section of the Act. In reaching its decision, the Fifth Circuit recognized that "[w]ithin the past half year the Second and Sixth Circuits have ruled that an implied private right of action does exist under the CEA," but stated that "both decisions were rendered by split panels over very forceful dissents." (Joint Appendix at 4a). The decision of the United States Court of Appeals for the Fifth Circuit unanimously rejected the holdings of the divided United States Courts of Appeals for the Second and Sixth Circuits and stands in irreconcilable conflict with those decisions. For this additional reason, together with the reasons heretofore presented, the Petitions for Writs of Certiorari

to the United States Court of Appeals for the Second Circuit filed by these petitioners should be granted.

Respectfully submitted,

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